83-53

No. _____

IN THE

Supreme Court of the United States

October Term, 1983

CHARLES SCHAAF,

Respondent,

v

CHESAPEAKE & OHIO RAILWAY CO.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT AND THE MICHIGAN COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

WHETHER, IN A CASE OF FIRST IMPRESSION IN THE STATE, THE MICHIGAN SUPREME COURT ERRED IN FAILING TO CORRECT A MICHIGAN COURT OF APPEALS' DECISION WHICH MISCONSTRUED SECTION 2 OF THE FEDERAL SAFETY APPLIANCES ACT, 45 USC 1, *ET SEQ*, IN HOLDING THAT THE JURY SHOULD NOT BE INSTRUCTED IN A MANNER CONSISTENT WITH ESTABLISHED FEDERAL CASE LAW THAT BEFORE THEY FIND A VIOLATION OF THE SAFETY APPLIANCES ACT FOR THE MERE FAILURE OF CARS EQUIPPED WITH NON-DEFECTIVE DRAW BARS AND COUPLERS TO COUPLE AUTOMATICALLY ON IMPACT, THEY MUST FIND THE FAILURE TO COUPLE ON IMPACT OCCURRED AFTER THE COUPLER HAD BEEN PROPERLY SET AND ALIGNED FOR COUPLING?

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PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT AND THE MICHIGAN COURT OF APPEALS

Chesapeake & Ohio Railway Co., petitioner, respectfully prays that a Writ of Certiorari issue to the Michigan Supreme Court to review the order entered in this cause January 21, 1983, and the opinion of the Michigan Court of Appeals dated February 19, 1982.

OPINIONS BELOW

Charles Schaaf v *The Chesapeake & Ohio R Co*, Michigan Court of Appeals, No. 52284, Opinion of February 19, 1982, vacating the April 11, 1980, jury verdict no causing plaintiff and remanding the cause for a new trial. Reported, 113 Mich App 544; 317 NW2d 679 (1982). (see Appendix A)

Charles Schaaf v *The Chesapeake & Ohio R Co*, Michigan Supreme Court, No. 68981, Order Denying Defendant's Application for Leave to Appeal because the Court is not persuaded that the question presented should now be reviewed by this Court issued January 21, 1983. (see Appendix B)

Charles Schaaf v *The Chesapeake & Ohio R Co*, Michigan Supreme Court, No. 68981, Order Denying Defendant's Motion for Reconsideration of its Order of January 21, 1983, because it does not appear that said Order was entered erroneously, issued April 20, 1983. (see Appendix C)

JURISDICTION

This case is brought to the United States Supreme Court following an order of the Michigan Supreme Court, dated January 21, 1983, denying the defendant's application for leave to appeal.

The Michigan Supreme Court denied defendant's motion for rehearing of the application for leave to appeal by order dated April 20, 1983.

Said order left standing the decision of the Michigan Court of Appeals dated February 19, 1982, that the trial judge erroneously instructed the jury that draw bars on railroad cars must be properly aligned before a violation of section 2 of the Safety Appliances Act, 45 USC 1, *et seq*, could occur through failure of the railroad cars to automatically couple upon impact.

The jurisdiction of this Honorable Court is invoked pursuant to 28 USC 1257(1), and United States Supreme Court Rule 19(1)(b)(c).

This case came to the Genesee County Circuit Court, Flint, Michigan, pursuant to 45 USC 2 and 45 USC 51.

STATUTES INVOLVED

45 USC 2:

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

45 USC 51:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or

closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

Plaintiff, Charles Schaaf, was a yard conductor at the Chesapeake & Ohio Railway Company's McGrew Yard in Flint, Michigan.

Among his responsibilities was the coupling and uncoupling of railroad cars.

On October 25, 1976, Mr. Schaaf was working with a crew which was ordered to couple an engine and two cabooses to another series of cars. Accordingly, Mr. Schaaf pulled the lever to open the knuckle and signaled the engineer to "couple" the cars.

The engine and cabooses were slowly backed into the Atchison, Topeka & Santa Fe Railroad Company tri-level freight car. From a safe position at the side of the cars, Mr. Schaaf could see that the knuckle on the Santa Fe car was open. However, the two cars did not couple. He then noted that the draw bar on the Santa Fe car was not properly aligned for coupling.

After signaling his crew to pull the engine and cabooses away from the Santa Fe car, Mr. Schaaf went between the two cars and moved the draw bar on the Santa Fe car into alignment. As he strained, he felt a snap in his back and began to experience pain.

After the draw bar had been adjusted, Mr. Schaaf again signaled the engineer to couple the cars and a successful coupling was made. Neither the coupler, nor the draw bar, were defective.

In October of 1978, a cause of action was instituted on behalf of Mr. Schaaf in the Genesee County Circuit Court against the Chesapeake & Ohio Railroad Company for the injuries he sustained. The case was tried to a jury. Pertinent to this petition, Mr. Schaaf claimed that his injuries were a result of the Chesapeake & Ohio Railroad Company's violation of the automatic coupling provision of the Safety Appliances Act. 45 USCA 2.

Following the presentation of proofs, extensive argument was had regarding the proper instruction to be given under the Safety Appliances Act.

Plaintiff argued that the failure of the railroad cars to couple was a *per se* violation of 42 USCA 2. He requested the court give the following instruction in reliance on *McGowan* v *Denver & Rio Grande W R Co*, 121 Utah 587; 244 P2d 628; *cert den*, 344 US 918; 17 S Ct 346; 97 L Ed 707 (1952).

> "If you should find that the plaintiff, in the performance of his duties, gave the coupler a fair trial in conformity with the intended manner of operation, and the coupler, when so operated, failed to work efficiently, and it became necessary to go between the cars to operate same, then you must find that the railroad violated the Act aforementioned."
>
> "The Safety Appliances Act requires couplers which will couple automatically by impact without the necessity of men going between the cars and the fact that some lateral motion in the coupler mechanism is necessary and the operation of defendant's trains does not relieve the defendant from the requirements to said Act."

Defendant requested an instruction fashioned after that given in *Cobb* v *Union R Co*, 318 F2d 33 (CA 6); *cert den*, 357 US 945; 84 S Ct 352; 11 L Ed 2d 275 (1963).

The trial judge, over plaintiff's objections, gave the following instruction:

> "To comply with the law just stated, a coupler must be one which operated in the manner intended performs its function in all of the ordinary conditions under which couplings or uncouplings are made, second, the duty of the defendant was to equip the car in question with a coupler which when operated in the manner intended would work efficiently by raising the coupling level. If you should find — this is three — if you should find the plaintiff in the performance of his duties aligned the draw bar and the knuckle or knuckles were in the proper position for coupling and that the coupler failed to function properly thereafter, then you must find a violation of the Federal Safety Appliances Act.
>
> The mere failure of cars to couple automatically on impact is not sufficient to constitute a violation of the Safety Appliances Act, unless you find that such failure, if any, occurred after the coupler had been properly set and aligned for coupling and the cars were handled in the proper manner for impact coupling.
>
> I am going to read that again to you. The mere failure of cars to couple automatically on impact is not sufficient to constitute a violation of the Safety Appliances Act unless you find that such failure, if any, occurred after the coupler had been properly set and aligned for coupling, and that the cars were handled in the proper manner for impact coupling."

A jury verdict of no cause of action in favor of the Chesapeake & Ohio Railroad Company was returned, and judgment was entered accordingly on April 17, 1980. A motion on behalf of plaintiff for a new trial was denied on June 4, 1980.

Claim of Appeal to the Michigan Court of Appeals was filed by plaintiff on June 24, 1980. The issue raised was:

> "Did the trial court err in instructing the jury that the draw bar must be properly aligned before they could find a violation of Section 2 of the Federal Safety Appliances Act, 45 USC 2, for failure of the cars to couple automatically upon impact?"

On February 19, 1982, the Michigan Court of Appeals issued a per curiam opinion vacating the April 11, 1980, jury verdict of no cause of action and remanded the case back to the circuit court for a new trial.

The court opined that although no Michigan appellate court had yet addressed itself to the issue on appeal, every other appellate court presented with the question had ruled that a misaligned draw bar is in and of itself sufficient to constitute a violation of the Safety Appliances Act.

On March 9, 1982, defendant, Chesapeake & Ohio Railroad Company, made application for leave to appeal to the Michigan Supreme Court. The identical issue was raised. Leave was denied by order dated January 21, 1983, on the grounds that the court was not persuaded that the question presented should now be reviewed. (Appendix B)

On February 4, 1983, defendant made a motion for reconsideration of leave to appeal in the Michigan

Supreme Court. The motion for reconsideration of the court's order of January 21, 1983, was denied. (Appendix C)

From said decisions, defendant brings this petition for writ of certiorari in the United States Supreme Court.

ARGUMENT

Petitioner, Chesapeake & Ohio Railway Company, asks that this Honorable Court issue its Writ of Certiorari in this case for the reason that the Michigan Supreme Court, by denial of application for leave to appeal and denial of motion for reconsideration, let stand a decision of the Michigan Court of Appeals which Petitioner submits is in conflict with the Sixth Circuit's holding in *Cobb* v *Union R Co, supra*.

Additionally, it is submitted that the opinion of the court of appeals, if allowed to stand by the denial of the application for leave to appeal to the Michigan Supreme Court, as well as its denial of the motion for reconsideration, has decided a federal question in a way which is in conflict with this court's decision in *Affolder* v *New York, C & St L R Co*, 339 US 96; 70 S Ct 509; 94 L Ed 683 (1950), which holds that a railroad has a good defense in an action brought under the Safety Appliances Act if the failure to couple upon impact is due to the fact that the coupler was not placed in a position to operate on impact.

Accordingly, it is the Michigan Court of Appeals per curiam opinion of February 19, 1982, which forms the basis of this petition for writ of certiorari.

The only issue which was before the court of appeals was whether or not the trial judge erred in instructing the jury that the railroad car draw bars had to be aligned

before a violation of the Safety Appliances Act could occur through failure of the railroad cars to automatically couple upon impact.

In reviewing the case, the court of appeals acknowledged that railroad cars will not couple unless draw bars are properly aligned and at least one knuckle on the end of the draw bar is open. However, the court ruled that:

> "Although no Michigan appellate court has yet addressed this issue, every other appellate court presented with this question has ruled that a misaligned draw bar is in itself enough to constitute a violation of the Safety Appliances Act." (Appendix A)

The court cites as authority *Kansas City Southern R Co* v *Cagle*, 229 F2d 12 (CA 10, 1955); *Metcalf* v *Atchison, Topeka & Santa Fe R Co*, 491 F2d 892 (CA 10, 1974); *Hallenda* v *Great Northern R Co*, 244 Minn 81; 69 NW2d 673 (1955); and *Donnelly* v *Pennsylvania R Co*, 342 Ill App 566; 97 NE2d 846 (1951).

No mention was made of either *McGowan* v *Denver & Rio Grande W R Co*, *supra*, or *Cobb*, *supra*, in spite of the fact that these cases were cited as authority for the disputed instructions.

It distinguishes the *Affolder* case on the facts ruling that *Affolder* is strictly a coupler case, not a draw bar case, and since "a draw bar . . . can only be aligned manually by someone pushing it while standing between railroad cars", absolute liability is imposed.

Petitioner asserts that the Michigan Court of Appeals' decision in this case is in conflict, not only with this court's opinion in *Affolder* v *New York, C & St L R Co*, *supra*, but is also in conflict with the Sixth Circuit Court of Appeals in *Cobb* v *Union R Co*, *supra*, and is erroneous.

Decisions of the United States Supreme Court concerning the construction and the application of a federal statute are precedent-binding, not only on the lower federal courts, but also on the state courts, including the highest court in the state. *Chesapeake & Ohio R Co* v *Martin*, 283 US 209; 51 S Ct 453; 75 L Ed 983 (1931).

The interpretation of words used in a federal statute is a federal question which is not to be determined by local law unless the federal statute is construed to intend the meaning of a particular word which depends on applicable state law. *Lembcke* v *United States*, 181 F2d 703 (CA 2, 1950).

It is also in contravention of our own Michigan Supreme Court's mandate that a state court is bound by the authoritative holdings of federal courts upon federal questions. Only in the event that there is no Supreme Court interpretation of a statute in question is the court allowed to choose between federal courts of appeals which may be in disagreement and, in that event, preference may be shown for the holding of the circuit most familiar with the law of the form of state. *Schueler* v *Weintrob*, 360 Mich 621; 105 NW2d 42 (1960).

The net result is:

> The statute is construed to include violations for an act which a statute was not intended to include;
>
> The statute is extended to provide a remedy for a violation not envisioned by the draftors without providing the defendant a legal defense as the Supreme Court did in *Affolder* v *New York, C & St L R Co, supra*;

> The court refused to recognize the evidentiary facts that there was no defect or actual failure of the coupler to perform properly when 'set' to couple.

There is no dispute that section 2 of the Federal Safety Appliances Act imposes absolute liability upon the railroad in the event that any car moving in interstate commerce is not equipped with couplers which couple automatically by impact, and which may be uncoupled without the necessity of men going between the cars.

This section of the Safety Appliances Act was enacted in 1893. Subsequently, the statute was construed by the United States Supreme Court in several different decisions in which it made it plain that the evils against which the provisions of this statute were directed to were those attendant to the old fashioned link and pin or similar couplings where it was necessary for men to go between the cars to couple and uncouple them, and where the coupled cars sometimes separated by reasons of the insecurity of the couplings. *Johnson* v *Southern Pacific Co*, 117 F 462 (CA 8, 1902); *rev'd*, 191 US 1; 25 S Ct 158, 49 L Ed 363 (1904).

It is interesting to note, in view of the facts of this case, that at the time the Safety Appliances Act, sections 1-16, was enacted, a provision was also enacted dealing with the height of draw bars. This Honorable Court said of the two provisions, that is, of the one dealing with automatic couplers and the one dealing with the height of the draw bars, that:

> "Where one vehicle is used in connection with another, that portion of the equipment of each that has to do with the safety and security of the attachment between them shall conform to the standard." *St Louis R Co* v *Conarty*, 238 US 243; 35 S Ct 785; 59 L Ed 1290 (1915).

The standard dealing with draw bars states:

> "No freight cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the prescribed standards as to height of draw bars." 45 USC 5.

This court's attention is directed to the draw bar statute for the purpose of showing that concerns relating to the use and safety of draw bars were considered by Congress in 1893, at the time that the coupling statute was enacted. Further, this particular section of the Safety Appliances Act does not deal with the horizontal movement of draw bars, nor does any other section of the Act, although there can be no question that the realignment of draw bars was, and continues to be, among the duties of switchmen, brakemen and conductors.

We believe the Act is intended to safeguard employees by requiring railroads to use couplers which do not require them to go between the cars while the cars are in motion. The Act is not directed to static conditions.

The Michigan Court of Appeals would adopt the rule in *Metcalfe*, that a failure of the cars to couple automatically because of a misaligned draw bar is sufficient to state a finding that section 2 has been violated. *Metcalfe*, however, is not the leading authority for the issue raised in this appeal. The principal issue in *Metcalfe* was the sufficiency of the evidence to support a finding of whether or not the violation was the cause in whole or in part of the death of Metcalfe.

The testimony was that Metcalfe stepped between the cars and opened the knuckle on the boxcar. Testimony of a fellow worker revealed that "he dropped straight out of sight." *Ibid* at 895. The worker found Metcalfe pinned beneath the southeast wheels of the boxcar.

In addition, it was plaintiff's position that the necessity of realigning a draw bar in order to couple the cars — after the accident — justified a conclusion that the draw bar was out of line, thus a violation of section 2 of the Safety Appliances Act.

What the *Metcalfe* court did, in essence, was to take away the *Affolder* defense from the railroad by focusing on the draw bar instead of the couplers. It was clear from the testimony that there was a defense since the couplers were not "set" to couple, testimony having shown that Metcalfe stepped between the cars to operate a knuckle on a boxcar.

This posture ignores the very statement of the *Metcalfe* court itself that:

> "In some cases, the draw bar may move so far off-center as to preclude automatic coupling. In such cases, it is necessary to go between the cars to adjust the draw bars." *Id* at 896.

If the *Metcalfe* court really believed that in order to effect automatic coupling misaligned draw bars must be adjusted before an attempt is made at coupling, it is incredible that they believe that there is a violation of section 2 of the Safety Appliances Act when an attempt at coupling is made unsuccessfully with a misaligned draw bar without providing the railroad the right to have the jury instructed that the burden of proof is upon the plaintiff to show that the couplers were properly set before there could be a violation for failure to automatically couple upon impact.

The jury must be allowed to take into consideration that if the draw bars are not aligned and the couplers are not opened, a failure to couple automatically does not impose absolute liability under section 2 of the Safety Appliances Act. For these reasons, we do not believe the *Metcalfe* case is good law.

The *Cobb* case, which came out of the Sixth Circuit Court of Appeals, and the *Affolder* case, which came out of this court, are cases which clearly define the type of instruction which should be given in section 2, Safety Appliances Act cases.

The failure to follow the directives given in these cases is reversible error.

The statements of the applicable law contained in *Cobb* are:

> . . . If the couplers failed to couple automatically upon impact the jury could infer from the fact, but they were not required to infer, that the failure was under circumstances constituting a violation of the Act. (p. 37)
>
> It is the plaintiff's responsibility to carry the burden of proof by the preponderance of the evidence that the injuries were proximately caused by the defendant's violation of the Safety Appliances Act before there can be recovery. (p. 37)
>
> It was the duty of the switchman to signal the engineer that the couplers were properly set before coupling. (p. 36)
>
> [T]he district judge properly told the jury that they could not find a violation of the act is the couplers failed to automatically couple if they were not properly set, but if they failed for any other reason, there would be a violation. (p. 37)
>
> . . . [I]f couplers fail to couple automatically because they are not properly set for coupling under the circumstances, this failure of the cars to couple is not a violation of the Safety Appliances Act, but if they fail to couple automatically by

> impact for any other reason, then this would be a violation of the Safety Appliances Act. (p. 36)
>
> The District Judge told the jury in another part of his charge that if they found that the couplers failed to couple automatically because they were not properly set that such failure would not be a violation of the Act. This was an accurate statement of law and covered defendant's point made in Request No. 3. (p. 36)

The same distinction can be made between this case and *Hallenda* v *Great Northern R Co, supra*, and *Metcalfe* v *Atchison, Topeka & Santa Fe R Co, supra*. In each of these cases, the plaintiffs were injured on impact of the cars. In *Hallenda*, Plaintiff was standing on a flat car when he heard the sound of approaching cars. He grabbed the brake wheel so as to brace himself, but was thrown from the car. An examination after the accident revealed that the knuckles on the ends of both of the cars were open before the impact. Thus, the cars should have coupled, unless the couplers were defective, and the jury was warranted in finding a violation of the Safety Appliances Act.

In *Metcalfe, supra*, the plaintiff was killed when his body was pinned beneath the wheels of a boxcar, evidencing movement at the time of the injury.

In this case, Schaaf was injured in the process of setting the moveable draw bar between the car frame and the coupler so that when he finished, the couplers would be in a position to impact and couple when he signaled the engineer to back up the train.

After Schaaf had set the coupler knuckle and aligned the draw bar, he moved to a safe position. The couplers coupled automatically upon impact.

Schaaf was not injured as a result of any defective equipment, or as a result of an impact which occurred in an unsuccessful effort to couple the cars. There was no movement of the train or the tri-level car at the time of the alleged injury.

The holding in *Finley* v *Southern Pacific R Co*, 179 Cal App 2d 424; 3 Cal Rep 895 (1960), also states the applicable law.

In that case, Finley, a switchman, was seated on top of a boxcar and was injured during the second impact of cars which failed to couple.

The evidence showed that the coupler was open on the car which was to couple with the first series of cars in the cut.

The appellate court's discussion of the jury instructions included a "fair trial" test to determine if there had been a violation of section 2 of the Safety Appliances Act. The court said:

> Was there a fair trial, that is; was there an honest effort to attempt a coupling by impact, was it attempted in the ordinary, reasonable, customary manner; that if there was not a fair test given and the coupling failed to operate, there was no violation of the act — if there was a fair trial and the coupler did not operate at the time and place of the accident and its failure proximately caused the injuries in question, a violation of the act occurred; and that liability for failure to comply is absolute and not dependent upon lack of reasonable care — the violation is itself negligence. The propriety of none of these instructions has been questioned. *Id* at 897.

The authorities applicable to this case are the holdings in *Affolder*, *Cobb*, and *Finley*. These are the three cases which specifically review instructions given in cases involving violations of section 2 of the Safety Appliances Act.

The Michigan Court of Appeals, in its opinion, evidences that it chose to completely disregard the *Cobb* case notwithstanding that *Cobb* is cited as authority for the instruction which was given by the trial court.

The only instruction case that it discusses is *Affolder*, and it distinguishes this case on the coupler versus the misaligned draw-bar theory.

CONCLUSION

The opinion of the Michigan Court of Appeals, allowed to stand by the denial of the application for leave to appeal by the Michigan Supreme Court, and its denial for motion for reconsideration, has decided a federal question in a way which is in conflict with this Court's holding in *Affolder* v *New York, C & St L R Co, supra*. Additionally, it is in conflict with the Sixth Circuit's holding in *Cobb* v *Union R Co, supra*.

Both of these opinions are directly on point in that they instruct the trial court specifically on the kind of instructions which should be given in a case involving a violation of section 2 of the Safety Appliances Act.

Any attempt to distinguish these cases on the facts so as to avoid giving the defendant the benefit of the *Affolder* defense is in direct contravention of the holding of this Court.

RELIEF REQUESTED

For the reasons above set forth, Petitioner respectfully prays this Court issue its Writ of Certiorari in this case to the Michigan Supreme Court and the Michigan Court of Appeals and stay the proceedings in the Genesee County Circuit Court, Flint, Michigan.

Respectfully submitted,

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Dated: July 7, 1983

APPENDIX A

OPINION

(State of Michigan — Court of Appeals)

(Released February 19, 1982)

(Charles Schaaf, Plaintiff-Appellant, v Chesapeake & Ohio Railway Company, Defendant-Appellee — No. 52284)

Before: Bronson, P. J., T. M. Burns and Corden, JJ.

Per Curiam

Plaintiff appeals as of right an April 11, 1980, jury verdict no causing him in this action, brough (sic) under the Federal Employers' Liability Act, 45 USCA 51, and the Federal Safety Appliances Act, 45 USCA 2. We reverse.

Plaintiff was employed as a yard conductor for the defendant railway company. This position required him to couple and uncouple box cars. On October 25, 1976, plaintiff was instructed to couple an engine and two cabooses with another series of railroad cars.

Railroad cars will not couple unless their drawbars are properly aligned and at least one knuckle on the end of a drawbar is open. A drawbar can be adjusted into alignment manually by pushing or pulling on the bar from the end of its railroad car.

On the date in question plaintiff initially was unable to couple the series of railroad cars with the engine and caboose because the drawbars were not aligned. Plaintiff signaled the engineer to pull the engine and cabooses away from the other cars and then went between the cars

and attempted to move one of the drawbars into alignment. He was in the process of shoving on the bar when he felt his back snap and he suffered severe injury.

In October, 1978, plaintiff filed suit. He maintained that the railroad was strictly liable for his injuries because it had violated the automatic coupling provisions of the Safety Appliances Act, 45 USCA 2. That act provides:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Plaintiff argued at trial that the failure of the railroad cars to couple upon impact was a per se violation of the Safety Appliances Act and that the jury should be so instructed. Defendant countered that the jury should be instructed that no violation of this act could be found unless both drawbars were properly aligned before the attempt at coupling took place. After listening to extensive argument by the parties, the trial judge adopted defendant's argument and instructed the jury accordingly:

> "Now, let's talk about what the real duty is with respect to the railroad and automatic couplers, and I ask you to pay particular attention to this:
>
> "To comply with the law just stated, a coupler must be one which operated in the manner intended, performs its function in all the ordinary conditions under which couplings or uncouplings

are made, second, the duty of the defendant was to equip the car in question with a coupler which when operated in the manner intended would work efficiently by raising the coupling lever. If you should find — this is 3 — if you should find the plaintiff in the performance of his duties aligned the draw bar and the knuckle or knuckles were in the proper position for coupling and that the coupler failed to function properly thereafter, then you must find a violation of the Federal Appliance Safety Act.

"The mere failure of cars to couple automatically on impact is not sufficient to constitute a violation of the Safety Appliance Act, unless you find that such failure, if any, occurred after the coupler had been properly set and aligned for coupling and the cars were handled in the proper manner for impact coupling.

"I'm going to read that again to you. The mere failure of cars to couple automatically on impact is not sufficient to constitute a violation of the Safety Appliance Act unless you find that such failure, if any, occurred after the coupler had been properly set and aligned for coupling and that the cars were handled in the proper manner for impact coupling."

The jury returned a verdict in favor of defendant. Plaintiff's motion for a new trial was denied and now plaintiff appeals.

The single issue raised in this appeal was whether the trial judge erred in instructing the jury that the railroad car drawbars had to be aligned before a violation of the Safety Appliances Act could occur through failure of the railroad cars to automatically couple upon impact.

Although no Michigan appellate court has yet addressed this issue, every other appellate court presented with this question has ruled that a misaligned drawbar is in itself enough to constitute a violation of the Safety Appliances Act. In *Kansas City Southern RR Co* v *Cagle*, 229 F2d 12, 14 (CA 10, 1955), the Federal Court of Appeals addressed a factual situation substantially similar to that at bar. There, an out-of-alignment drawbar was in such a condition that it would not automatically couple to railroad cars upon impact. As a result, it was necessary for an employee to manually align the drawbar so that the coupling could be made. While doing so, an employee was injured. The Federal Court of Appeals held:

> "Without exception the cases have held that operating a car on which the drawbar is so far out of alignment as to prevent automatic coupling violates the [Safety Appliances] act and imposes absolute liability."

See also *Metcalfe* v *Atchison, Topeka and Santa Fe RR Co*, 491 F2d 892, 896-897 (CA 10, 1974) (citing cases), *Hallenda* v *Great Northern RR*, 244 Minn 81; 69 NW2d 673, 681 (1955) (holding that it is no defense in an action brought under the Safety Appliances Act that if the failure of drawbars to couple upon impact was caused by misalignment), *Donnelly* v *Pennsylvania RR Co*, 342 Ill App 556; 97 NE2d 846 (1951).

We find these cases to be persuasive. Defendant fails to cite, and our research has not discovered, any case holding that drawbars must be properly aligned before a railroad can be found guilty of a violation of the Safety Appliances Act. The case of *Affolder* v *New York, Chicago and St. Louis RR Co*, 339 US 96; 70 S Ct 509; 94 L Ed 683 (1950), is distinguishable because that case involved the failure of two cars to couple on impact because a coupler

had not been properly opened. There is a crucial distinction between a coupler and a drawbar. A coupler can be opened and closed without the necessity of having someone go between any railroad cars. A drawbar, however, can only be aligned manually by someone pushing it while standing between railroad cars. Therefore, the trial judge's instructions to the jury were in error. The April 11, 1980, jury verdict no causing plaintiff is vacated and this cause is remanded for a new trial.

Reversed and remanded.

APPENDIX B

ORDER

(State of Michigan — Supreme Court)

(Entered January 21, 1983)

(Charles Schaaf, Plaintiff-Appellee, v Chesapeake & Ohio Railway Co., Defendant-Appellant — SC: 68981; COA: 52284; LC: 78-49979-NO)

Present the Honorable: G. Mennen Williams, Chief Justice; Thomas Giles Kavanagh, Charles L. Levin, James L. Ryan, Dorothy Comstock Riley, James H. Brickley, Michael F. Cavanagh, Associate Justices

At A Session Of The Supreme Court Of The State Of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 21st day of January in the year of our Lord one thousand nine hundred and eighty-three.

On order of the Court, the application for leave to appeal is considered, and it is Denied, because the Court is not persuaded that the question presented should now be reviewed by this Court.

(Certification Omitted)

APPENDIX C

ORDER

(State of Michigan — Supreme Court)

(Entered April 20, 1983)

(Charles Schaaf, Plaintiff-Appellee, v Chesapeake & Ohio Railway Co., Defendant-Appellant — SC: 68981; COA: 52284; LC: 78-49979-NO)

Present the Honorable: G. Mennen Williams, Chief Justice; Thomas Giles Kavanagh, Charles L. Levin, James L. Ryan, James H. Brickley, Michael F. Cavanagh, Associate Justices

At A Session Of The Supreme Court Of The State Of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 20th day of April in the year of our Lord one thousand nine hundred and eighty-three.

On order of the Court, the motion by defendant-appellant for reconsideration of this Court's order of January 21, 1983, is considered, and the motion is Denied, because it does not appear that said order was entered erroneously.

(*Certification Omitted*)

83-58

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHARLES SCHAAF,
Respondent

v.

CHESAPEAKE & OHIO RAILWAY CO.,
Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT AND THE MICHIGAN COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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CHESAPEAKE & OHIO RAILWAY CO.,
Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Charles Schaaf, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the order of the Michigan Supreme Court and the opinion of the Michigan Court of Appeals in this case.

QUESTION PRESENTED

Does a trial court err in instructing a jury that failure of railroad cars to automatically couple upon impact is not a violation of section 2 of the Safety Appliance Act, 45 U.S.C. §1 *et. seq.*, if the failure to couple is caused by misalignment of the drawbars, even though, under such circumstances, coupling cannot occur without the necessity of men going between the ends of the cars in order to align the drawbars?

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case, but makes the following additions in order to provide the Court with a more complete statement of the facts material to the question presented.

Much of the testimony taken at trial in this case concerned the mechanisms and procedures for the proper coupling and uncoupling of railway cars, with particular emphasis on two pieces of equipment found on every car—the drawbar and the knuckle.

The metal drawbar weighs between 300 and 1,000 pounds (T. 157, 290).[1] It is attached to the undercarriage of the railway car and extends through the bottom center of both the front and back of the car. The drawbar is not stationary; it moves from side to side within a narrow channel so the train can negotiate curves (T. 199). Attached to the end of each drawbar is the knuckle (also known as the coupler) by which the actual coupling of cars is perfected.

Normally, the coupling of railway cars is completed by "bumping" a slowly moving car into a stationary car, thus connecting the knuckles. However, before such a coupling can take place, two conditions must be satisfied. At least one of the cars' knuckles must be opened and the drawbars on the two cars must be properly aligned (T. 75, 314).

The knuckle may be opened or closed through the use of an operating lever which is attached to the side of every car (T. 73, 290, 306). Thus, there is no "necessity of men going between the ends of the cars" in order to open the knuckle. The drawbar, however, can only be adjusted by manually pushing or pulling on the bar from the end of the car (T. 200-201, 292).

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[1] References are to the pages of the transcript of the trial in this matter which commenced on March 25, 1980.

That distinction between the manner of operating the coupler and the manner of operating the drawbar, along with the unanimous decisions of courts which have addressed the question presented here, was the basis of the holding of the Michigan Court of Appeals from which Petitioner seeks relief. (See Opinion, Appendix A in Petition for Writ of Certiorari [hereinafter Petition] at 22-23).

REASONS WHY THE WRIT SHOULD BE DENIED

1. There is no conflict of decisions on the issue presented in the petition.

Petitioner seeks grant of a writ of certiorari on the sole ground that the decision in this matter is in conflict with this Court's holding in *Affolder* v. *New York, C. & ST. L. R. Co.*, 339 U.S. 96, 70 S. Ct. 509, 94 L. Ed. 683 (1950), and with the Sixth Circuit's holding in *Cobb* v. *Union R. Co.*, 318 F.2d 33 (6th Cir.), *cert. denied*, 357 U.S. 945, 84 S. Ct. 352, 11 L. Ed. 2d 275 (1963). Respondent submits that there is no conflict between this case and either *Affolder, supra*, or *Cobb, supra*, because the issue presented here was neither raised nor decided in *Affolder, supra*, or *Cobb, supra*. Moreover, the decision in this matter not only is consistent with the reasoning in this Court's prior decisions, including *Affolder, supra*, which have construed the statute at issue here under materially different factual circumstances, but also is in full accord with the decisions of all federal and state courts which have addressed the issue presented here.

Section 2 of the Federal Safety Appliance Act, 45 U.S.C. §2, provides:

> It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

It is undisputed that the issue in this case is whether the Michigan appellate courts properly found that the trial court erred in instructing the jury that the failure of the railroad cars to couple automatically on impact does not constitute a violation of section 2 of the Federal Safety Appliance Act if the drawbar on which the coupler is mounted is not aligned for coupling. (*See* Petition at 8-9. *See also* Opinion of the Michigan Court of Appeals in Petition, Appendix A, at 21).

As a preliminary matter, it is important to note that although this Court has not directly addressed the question whether the *Affolder* decision affects the instant case, it has already recognized that the alignment of drawbars is an integral part of the coupling operation subject to the constraints of the Safety Appliance Act. *Atlantic City Railroad* v. *Parker*, 242 U.S. 56, 37 S. Ct. 69, 61 L. Ed. 150 (1916); *San Antonio & Aransas Pass Ry.* v. *Wagner*, 241 U.S. 476, 36 S. Ct. 626, 60 L. Ed. 1110 (1916).

In *Affolder, supra*, plaintiff was injured when he ran after and attempted to board a railroad car which failed to couple on impact and began rolling down the track. The pertinent issue in *Affolder* was whether the court had properly instructed the jury that if the coupler had not been opened prior to the coupling attempt, the failure to couple was not a violation of the Safety Appliance Act. 339 U.S. at 99. This Court's holding that the instruction was proper, *id.*, recognized a defense to the otherwise absolute duty "requiring performance [i.e., coupling] on the occasion in question." *Id.* at 98, citing *O'Donnell* v. *Elgin, Joliet & Eastern R. Co.*, 338 U.S. 384, 70 S. Ct. 200, 94 L. Ed. 187 (1949).

Recognition of that defense, however, is not precedent for recognition of a similar defense with respect to alignment of drawbars because the methods involved in the opening of a coupler and those involved in aligning of a drawbar are different in details material to section 2 of the Safety Appliance Act. Indeed, the Court's rationale underlying recognition of the closed-coupler defense to the

otherwise absolute statutory duty leads inexorably to the conclusion that creation of a defense for misaligned drawbars would directly contravene the statute.

The test of compliance with section 2 of the Safety Appliance Act is whether coupling and uncoupling can be accomplished "without the necessity of men going between the ends of the cars." 45 U.S.C. §2; *Johnson* v. *Southern Pacific Co.*, 191 U.S. 1, 16, 25 S. Ct. 158, 49 L. Ed. 363 (1904). Automatic couplers are designed so that coupler-knuckles can be opened by operating a lever installed for that purpose on the side of every car. Thus, because there is no "necessity of men going between the ends of the cars" in the performance of the coupling operation, the closed-knuckle defense fully conforms to the legislative purpose underlying the Safety Appliance Act.

In contrast to the method of opening a coupler, the alignment of drawbars must be performed manually from a position at the end of a railroad car (T. 201, 291). There is no mechanism provided to adjust the drawbar alignment while standing at the side of the car. *See McGowan* v. *Denver & Rio Grande W. R. Co.*, 121 Utah 587, 244 P. 2d 628, 630 n.2, *cert. denied*, 344 U.S. 918, 73 S. Ct. 346, 97 L. Ed. 707 (1952) (describing coupling mechanisms). *Cf. Donnelly* v. *Pennsylvania R. Co.*, 412 Ill. 115, 105 N.E.2d 730, 731-732, *cert. denied*, 344 U.S. 855 (1952) (buffer springs are intended to return the drawbar to its center position but misaligned drawbars must be centered manually).

Thus, the only question presented on appeal of this matter—whether section 2 of the Safety Appliance Act is violated by the failure of the railroad cars to couple automatically on impact due to misalignment of the drawbars—was not addressed in *Affolder*. Moreover, the rationale for the *Affolder* decision is not transferrable to the question presented here because the facts material to the disposition of the issue in each case differ in crucial respects under both the terms and the purposes of section 2 of the Safety Appliance Act. Therefore, Petitioner's claim

that the decision of the Michigan appellate courts is in conflict with the *Affolder* decision is demonstrably false.

Petitioner's claim that the instant decision is in conflict with the decision of the Sixth Circuit in *Cobb, supra,* is similarly without merit. The issue in *Cobb* was whether there was sufficient evidence from which a jury could infer that the couplers were "properly set" at the time they failed to automatically couple. 318 F.2d at 37.

The *Cobb* court never explicitly explained whether the term "properly set" referred to the knuckle or to the drawbar. However, the *Cobb* court's extensive reliance on *Affolder, supra* at 36-37, demonstrates that the *Cobb* decision was addressed to the question whether the knuckle was open or closed when coupling was attempted.

Thus, Petitioner's attempt to portray the instant decision as conflicting with the *Cobb* holding is equally as unavailing as that attempt with this Court's *Affolder* decision. A conflict simply does not exist because there are crucial distinctions in the methods of opening a knuckle and those of aligning a drawbar vis-a-vis the requirement for section 2 of the Safety Appliance Act that there be no necessity to go between the ends of cars for coupling or uncoupling.

Finally, tellingly absent from the Petition in this matter, yet highly pertinent to the question of a claimed conflict, is acknowledgment of the fact that the decisions of all state and federal courts which have addressed the question presented here are unanimous in concluding that misalignment of drawbars is not a defense to a violation of section 2 of the Safety Appliance Act. *Kansas City Southern Railway* v. *Cagle,* 229 F.2d 12 (8th Cir.), *cert. denied,* 351 U.S. 908 (1956); *Finley* v. *Southern Pacific Co.,* 179 Cal. App. 2d 424, 3 Cal. Rptr. 895 (1960) (dictum); *Donnelly* v. *Pennsylvania R. Co., supra; Hallada* v. *Great Northern Railway,* 244 Minn. 81, 69 N.W.2d 673, *cert. denied,* 350 U.S. 874 (1955), *rev'd in part on other grounds,* ____ Minn. ____, 262 N.W.2d 377 (1977); *McGowan* v. *Denver & Rio Grande W.*

R. Co., supra. See Metcalfe v. *Atchison, Topeka & Sante Fe Railroad*, 491 F.2d 892, 896 (10th Cir. 1974); *Chicago St. P.M. & O. Ry.* v. *Muldowney*, 130 F.2d 971, 975-976 (8th Cir. 1942), *cert. denied*, 317 U.S. 700 (1943). *See also* Opinion of the Michigan Court of Appeals in Petition, Appendix A, at 22.

It is apparent that the alleged conflict presented by the instant decision is, at best, illusory. In order to create an apparent conflict, Petitioner's Argument ignores the cases which are directly on point and portrays the *Affolder* and *Cobb* decisions in only the most general terms, without reference to the facts which not only are crucial to those decisions but also are materially different from the instant controlling facts. *See* Petition at 8. That ineffectual effort to assert a nonexistent conflict demonstrates that no reason exists for the grant of certiorari.

2. Petitioner's argument is without merit because Petitioner's proposed construction of section 2 of the Federal Safety Appliance Act directly contravenes both the letter and the purpose of the Act.

The automatic coupler provision, section 2 of the Safety Appliance Act, is one part of a broader Federal program passed in 1893 which was designed for "the protection of employees and others by requiring the use of safe equipment." *Baltimore & Ohio R. Co.* v. *Jackson*, 353 U.S. 325, 329, 77 S. Ct. 842, 1 L. Ed. 2d 862 (1957).

To effectuate the basic remedial nature of the Safety Appliance Act and to ensure consistency with the clear language of the Act, the United States Supreme Court has held that railroads are absolutely liable for injuries occurring as a result of a violation of any part of the Safety Appliance Act. *Carter* v. *Atlanta St. Andrews Bay R. Co.*, 338 U.S. 430, 434, 70 S. Ct. 226, 94 L. Ed. 236 (1949). The railroad's liability under the automatic coupling requirements found in section 2 of the Act may thus be simply stated:

> If there was evidence that the railroad failed to furnish such "couplers coupling automatically by impact" as the statute requires . . . , nothing else needs to be considered. [Citation omitted].

Atlantic City R. Co., v. *Parker*, *supra* at 59.

Because of the absolute nature of the railroad's liability, questions concerning negligence or the defective nature of railroad appliances have no part to play in an action brought under the Federal Safety Appliance Act. As this Court stated in *Affolder*, *supra:*

> Nor do we think that any question regarding the normal efficiency of the couplers is involved in an action under the Safety Appliance Acts. As we said in O'Donnell v. Elgin, Joliet & Eastern R. Co., 1949, 338 U.S. 384, 70 S. Ct. 200, and the Carter case, supra, the duty under the Acts is not based on the negligence of the carrier but is an absolute one requiring performance "on the occasion in question."

339 U.S. at 98.

Under section 2 of the Act, the railroad is liable for any injury resulting from a failure of cars to couple automatically by impact. This liability attaches regardless of the reasons for the failure of the cars to couple so long as it can be established that the cars failed to automatically couple "on the occasion in question."

This Court has, on numerous occasions, identified the basic rationale underlying the adoption of section 2 of the Safety Appliance Act:

> The object was to protect the lives and limbs of railroad employees *by rendering it unnecessary for a man operating the couplers to go between the ends of the cars*. [Emphasis added].

Johnson v. *Southern Pacific Co.*, *supra* at 16. *See also United States* v. *Erie R. Co.*, 237 U.S. 402, 407, 35 S. Ct.

621, 59 L. Ed. 1019 (1914); *Southern R. Co.* v. *Crockett*, 234 U.S. 725, 733, 34 S. Ct. 897, 58 L. Ed. 1564 (1913).

The Safety Appliance Act was passed in 1893 in response to a marked increase in the number of deaths and serious injuries suffered by American railway workers, particularly by those workers engaged in the coupling and uncoupling of cars. To remedy this, Congress initiated the various reforms found in the Safety Appliance Act, placing significant emphasis on the elimination of any type of coupling device which required that a worker position himself between cars. It was on the basis of this desire to avoid any between-car operations by railway workers that the automatic coupler provision of the Act was proposed and ultimately passed. *See Johnson* v. *Southern Pacific Co.*, *supra* at 19-20 (discussing legislative history of automatic coupler provision).

This Court has consistently followed that legislative purpose in construing section 2 of the Act under various factual circumstances. *E.g.*, *O'Donnell*, *supra*, 338 U.S. at 389 (holding that coupler which does not remain coupled until set free by some purposeful act of control violates Act, despite lack of explicit statutory language to that effect); *Johnson* v. *Southern Pacific Co.*, *supra*, 191 U.S. at 18-19 (rejecting claim that words "without necessity of men going between the ends of cars" apply only to act of uncoupling, and holding that Act required that all couplers, even those of different types or brands, must operate uniformly so that all would couple automatically). The *Affolder* decision is, of course, in full conformity with that legislative rationale because the coupling operation at issue in *Affolder*, opening the knuckle, can be accomplished without the necessity of men going between the ends of the cars.

Petitioner's assertion that the defense recognized in the *Affolder* decision can be extended to the instant factual circumstances is totally groundless. First, Petitioner's contention that *Affolder* is controlling precedential authority is

readily dismissed because the question presented here was neither raised nor decided in *Affolder*, as explained in the discussion of the alleged conflict of decisions on this issue. Second, Petitioner's assertions that there was no defect in the coupling mechanism is irrelevant to the question of liability under section 2 of the Act. *E.g., Carter* v. *Atlanta St. Andrews Bay R. Co.*, 338 U.S. at 434.

Finally, review of the Petitioner's Argument reveals that Petitioner's claim that *Affolder* extends to the instant situation is, at its core, grounded on Petitioner's unsupported and untenable assertion that the Act was not intended to include misaligned drawbars. *See* Petition at 10-12. Not only does Petitioner fail to cite any authority for that crucial argument, but Petitioner attempts to base that argument on two equally unsupported claims—1) the Act does not deal with the horizontal movement of drawbars, and 2) the Act is not directed to static conditions, i.e., the Act has no application to coupling operations performed between the ends of cars while the cars are not in motion. Petition at 12.

Drawbars are an integral part of the coupling function. Indeed, they apparently have no other function than their role in coupling cars. *See, e.g., Donnelly*, 105 N.E.2d at 731 (coupling devices consist of a drawbar on the end of which is a knuckle); *McGowan*, 244 P.2d at 630 ("The drawbar, which is a part of the coupler, is a heavy piece of cast steel, anchored under the sill and beyond the car's end it enlarges into a head with a jaw on each side and a knuckle on the right side which swings on a pivot.").

To claim that the coupling provision of the Safety Appliance Act was not intended to include the drawbar is specious. The Act does not specify that only particular elements of coupling devices are covered by the Act. Rather, as invariably emphasized by this Court, the Act mandates the installation of such "equipment that the cars would couple with each other automatically by impact, and obviate the necessity of men going between them either for coupling or for uncoupling." *Southern R. Co.* v. *Crockett*,

supra at 733. Moreover, this Court has consistently construed that provision to prohibit any device or activity which contravened the declared purpose of Congress to promote the safety of employees and travelers upon the railroads. *Southern R. Co.* v. *Crockett, supra. See also O'Donnell, supra* at 389; *Johnson* v. *Southern Pacific Co., supra* at 16. Thus, since there is, and can be, no claim that Congress specifically excluded drawbars from its otherwise broad provision covering coupling devices, logic alone demonstrates the inaccuracy of Petitioner's claim that drawbars are not included in the Act.

Petitioner nevertheless attempts to support its position by arguing that section 2 does not mention drawbars, and that the only regulation of drawbars in the Act is the provision setting drawbar height requirements. In *Johnson* v. *Southern P. Co., supra,* this Court rejected a similar claim in which the railroad company argued that the coupling provision did not apply to locomotives because the provision refers only to "cars", whereas locomotives are specifically mentioned in other provisions of the Act, such as that requiring power brakes. This Court found that "car" was used in its generic sense in the coupling provision. The Court further found that the separate provision regarding power brakes was an additional, not a separate, regulation of locomotives because there are special reasons for locomotives, as compared with other cars, to have power brakes. Relying on the legislative intent behind the coupling provision, the Court reasoned that it was as necessary for the safety of employees in coupling and uncoupling that locomotives, as well as freight and passenger cars, be equipped with automatic couplers. 196 U.S. at 15-16.

Petitioner's claim that the Act regulates only the height and not the horizontal movement of drawbars must similarly be rejected. The coupling provision regulates the whole coupling operation, not just procedures involving a particular element such as the knuckle. Drawbar alignment, or, in other words, the horizontal movement of the drawbar, is a necessary part of the coupling operation. As

indicated in *Johnson, supra*, the separate provision regulating the height of drawbars does not indicate a legislative attempt to remove the drawbar alignment procedure from the provision regulating the coupling process. It is just as necessary for the safety of railroad employees that there be no necessity for going between the ends of the cars to align a drawbar as that they not go between the ends of cars to open a knuckle.

Moreover, this Court has already recognized the alignment of drawbars as an integral part of the coupling operation. In *Atlantic City Railroad Co. v. Parker, supra*, an engine backed into a car and failed to couple. The plaintiff saw that the drawhead was out of line, put in his arm to straighten it and was caught, losing his arm. This Court stated:

> If there was evidence that the railroad failed to furnish such "couplers coupling automatically by impact" as the statute requires [citation omitted], nothing else needs to be considered. We are of the opinion that there was enough evidence to go to the jury upon that point.
>
> * * * *
>
> If couplers failed to couple automatically upon a straight track, it at least may be said that a jury would be warranted in finding that a lateral play so great as to prevent coupling was not needed, and that, in the absence of any explanation believed by them, the failure indicated that the railroad had not fully complied with the law.

242 U.S. at 59. *See also San Antonio & Aransas Pass Ry. Co. v. Wagner, supra* (evidence of failure to couple on first attempt, together with fact that drawbar was so far out of line as to require manual adjustment before second impact, sufficient to sustain finding of violation of Safety Appliance Act).

Several lower courts, both federal and state, have had an opportunity to fully review Petitioner's claim that the

Affolder closed-coupler defense can be extended to misaligned drawbars. Without exception, those courts have unanimously rejected misalignment of drawbars as a defense to section 2 liability, holding that failure of railroad cars to couple automatically on impact due to misalignment of the drawbars is a violation of section 2 of the Safety Appliance Act. *Kansas City Southern Railway* v. *Cagle, supra; Finley* v. *Southern Pacific Co., supra; Donnelly* v. *Pennsylvania R. Co., supra; Hallada* v. *Great Northern Railway, supra; McGowan* v. *Denver & Rio Grande W. R. Co., supra. See Metcalfe* v. *Atchison, Topeka & Sante Fe Railroad, supra; Chicago St. P.M. & O. Ry.* v. *Muldowney, supra. See also Phillips* v. *Chesapeake & Ohio Railway*, 475 F.2d 22, 25 (4th Cir. 1973) (finding absolute liability under section 2 where plaintiff felt sharp pain in leg as he stepped away from railroad car after pulling lever to uncouple cars); *Buskirk* v. *Burlington Northern, Inc.*, 103 Ill. App. 3d 414, 431 N.E.2d 410, 412 (1982) (finding defendant absolutely liable under section 2 where plaintiff fell and injured his back while attempting to align drawbar after cars failed to couple), *cert. denied*, _____ U.S. _____, 74 L. Ed. 2d 173 (1982), *appeal pending*, _____ U.S. _____ (1982).

As in the instant case, those decisions are based upon this Court's construction of the Safety Appliance Act as conferring absolute liability for violation of the terms of the coupling provision, and on the material differences with the *Affolder* circumstances. The opinion of the Minnesota Supreme Court in *McGowan, supra*, exemplifies that approach.

> There is a distinction, however, between failure to couple because of misalignment and a failure because of closed knuckles. Knuckles are purposely opened and closed whereas the drawbar unintentionally becomes misaligned. Misalignment may result from wear which causes more lateral play than is necessary to permit the rounding of curves. An additional difference is that knuckles can be opened without going between the cars,

> whereas alignment is made by moving the drawbar which necessitates going between the cars. In the light of these differences, it is well to keep in mind that one of the basic purposes of the act is to require the automatic coupling and uncoupling without the necessity of men going between the cars.
>
> In view of these facts and the prior decisions which have refused to absolve railroads from liability on a defense of drawbar misalignment, it would be illogical to defeat a basic purpose of the Federal Safety Appliance Act by extending the rule of the Affolder case beyond its authoritative scope and thereby to attribute to the United States Supreme Court an intent to reverse its prior holdings by an implication to be drawn solely from the generality of its language.

69 N.W.2d at 680-681 (footnotes omitted). *See also Finley v. Southern Pacific Co., supra*, 3 Cal. Rptr. at 899-900 ("it is no defense that the failure to couple upon impact is caused by a misalignment of the drawbars") (dictum).

In summary, section 2 of the Safety Appliance Act prohibits the use of railroad cars which are not equipped with couplers coupling automatically by impact and which necessitate "men going between the ends of the cars" to accomplish coupling. The duty under that provision is absolute, with one exception (closed couplers) not at issue here. *Affolder, supra.*

In the instant case, two railroad cars failed to couple even though the knuckle on one of the cars was open (T. 524). Respondent was injured when he went between the ends of the cars in order to align the drawbars. Under the decisions of this Court and the unanimous decisions of federal and state courts addressing the question presented here, Petitioner is absolutely liable for Respondent's injuries. Therefore, the decision of the Michigan appellate courts in the instant case properly found that the trial court erred in instructing that failure of the railroad cars to

automatically couple on impact is not a violation of section 2 of the Safety Appliance Act if the failure to couple was caused by misalignment of the drawbars.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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